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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 8, 9, and 52

[FAC 2005-72; FAR Case 2009-024; Item II; Docket No. 2011-0086, Sequence No. 1]

RIN 9000-AM07

Federal Acquisition Regulation; Prioritizing Sources of Supplies and Services for Use by the Government

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to update and clarify the priority of sources of supplies and services for use by the Government.

DATES: Effective: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202-501-2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-72, FAR Case 2009-024.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 76 FR 34634 on June 14, 2011, to amend the Federal Acquisition Regulation (FAR) to limit the section of the FAR addressing the priorities for use of Government supply sources to a discussion of the mandatory Government sources of supplies and services. Seventy-nine respondents submitted comments. Most respondents requested that an Initial Regulatory Flexibility Analysis (IRFA) be performed. Based on the comments, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) performed an IRFA after the initial publication of the proposed rule. The IRFA was published in the Federal Register at 77 FR 54872 on September 6, 2012. Six respondents submitted comments in response to the Notice of Correction.

II. Discussion and Analysis

The Councils reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

- Language was added at FAR 7.102(a) to require consideration of existing contracts before creating new contracts.

- FAR 8.002(a)(1)(i) was revised to read "Inventories of the requiring agency" for clarification.

- FAR 8.003(d) has been revised to note that the Defense National Stockpile Center has been renamed "DLA Strategic Materials".

- FAR 8.004 was revised to note that the sources listed in 8.004(a) are not listed in any order of priority.

- A sentence was added to FAR 8.004 reminding users that when satisfying requirements from non-mandatory sources, they should refer to FAR 7.105(b) and part 19 regarding consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including 8(a) participants), and women-owned small business concerns. Use of these sources can be counted towards an agency's small business contracting goals.

B. Analysis of public comments

1. Federal Strategic Sourcing Initiative (FSSI)

Blanket Purchase Agreement (BPA) for office supplies

Comment: Most respondents believe the rule is both unnecessary and damaging to competition from small businesses throughout their industry. The FSSI program has curtailed their Federal market business which led to reduction in employees' hours.

Response: The purpose of the rule is to update and clarify the order of priority at FAR 8.002, and add a new section to encourage agencies to give consideration to using certain existing non-mandatory sources to leverage agency buying power and achieve administrative efficiencies that reduce costs and produce savings for our taxpayers. The rule does not change how agencies are purchasing supplies and/or services under Federal Supply Schedules.

No new mandatory sources are proposed for consideration, only existing sources were included for informational purposes. The existing non-mandatory sources are being listed prior to commercial sources, but agencies remain free to compete their requirements among commercial sources of supply, where it is in their best interest to meet their needs through open-market procurement.

2. Competition

Comment: Respondents indicated that the proposed rule would severely hamper competition in the Federal market place.

Response: This rule does not impede competition. No new mandatory sources are proposed for consideration under this rule. Existing sources were included for informational purposes, as a means of supporting market research, which is required by law (41 U.S.C. 3301(a)(2)) for the procurement of supplies and services. Competition in the open market

will continue if it is in an agency's best interests to meet its needs through open-market procurement.

3. Federal Supply Schedule (FSS) contracts

Comment: A respondent stated that the proposed rule is not clear about whether the contracting officer must check and use contracts under FSS if there is an FSS holder that can meet the agency's needs.

Response: The use of FSS is not required. However, under FAR 7.102(a)(4) of the final rule, agencies are encouraged to consider using FSS and other existing vehicles before considering sources in the open market.

4. The Murray Benjamin Electric Company protest

Comment: One respondent indicated that use of FSS is mandatory if the schedule holder is able to meet the agency's needs. The respondent stated that the Murray Benjamin case is ambiguous and the Government interpretation is faulty.

Response: The final rule amends FAR part 8 to clarify that use of FSS is not mandatory. Rather, as part of good market research, agencies are encouraged to consider using FSS and other existing vehicles before considering sources in the open market.

5. FAR Case 2008-003

Comment: One respondent indicated that the proposed rule undermines the intent behind the rule change from FAR

Case 2008-003. According to the respondent, 2008-003 final rule requires competition within the FSS for contracts over the simplified acquisition threshold. The respondent believed that the proposed rule requires competition to the open market, not just within FSS.

Response: Final rule 2008-003, "Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts," which required posting justification and approval documents for noncompetitive contracts, did not apply to placement of orders under the FSS. FAR Case 2007-012, "Requirements for Acquisitions Pursuant to Multiple-Award Contracts," which implemented section 863 of the Duncan Hunter National Defense Act for Fiscal Year 2009, required posting of sole source task or delivery orders in excess of the simplified acquisition threshold that are placed against multiple award contracts. This rule is consistent with the intent of FAR Case 2007-012 to provide enhanced competition.

6. Other requested changes to FAR part 8

Comment: A respondent indicated that the rule should not include Governmentwide Acquisition Contracts (GWACs) in FAR part 8 and give them the same level of priority as FSS contracts.

Response: The inclusion of GWACs in FAR part 8 is appropriate as they are existing contract vehicles available

for use by multiple agencies. Agencies are encouraged to consider existing vehicles prior to awarding new contracts.

Comment: A respondent recommended that FAR 8.004 be revised to include text that explains that the enumerated contracts are not, as the preamble to the proposed rule notes, listed in any order of priority.

Response: The language of the final rule was revised to include this clarification.

7. Comments submitted on the IRFA

Comment: Several respondents expressed their disappointment with the rule and suggested further study of the negative impacts of the rule.

Response: Because the rule reflects existing policy and practices, there is no need to conduct additional economic impact analysis and other research called for by the respondents.

Comment: Various respondents expressed dissatisfaction with FSSI, due to a perceived impediment to competition.

Response: The reference to FSSI agreements in FAR 8.004(a)(1) of the final rule is provided as an example of existing non-mandatory sources that agencies are encouraged to consider as part of their market research before considering open market sources.

Comment: One respondent recommended requiring documentation in the contract file to reflect why an existing source does not meet the Government's needs.

Response: This type of documentation may be appropriate as part of the market research process detailed in FAR part 10, Market Research, and, in many cases, is already required by agency supplements to FAR part 10.

Comment: One respondent recommended that the Government require agencies to consider the use of existing sources rather than merely encouraging them to do so.

Response: The final rule amends FAR 7.102(a) to require, as part of acquisition planning, appropriate consideration of the use of pre-existing contracting (including interagency and intra-agency contracts) to fulfill requirements before awarding new contracts.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory

action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

Considerable concern was expressed by small business entities with the concept and practice of strategic sourcing as evidenced through FSSI agreements. However, the rule itself only references FSSI agreements as an example of existing contract sources that agencies, as part of good market research, are encouraged to consider using before considering sources in the open market. After due consideration of pre-existing contracts, agencies remain free to compete their requirements among commercial sources of supply.

No significant changes were made from the proposed rule in response to comments on the IRFA.

No comments were submitted by the Chief Counsel for Advocacy of the Small Business Administration.

This rule deals with the order of preference for sources that must be considered, and to distinguish them from sources that should be considered where an agency is unable to satisfy requirements for supplies and services from mandatory sources. This rule will not affect how many small businesses are awarded this type of contract.

This rule does not add any new information collection requirements.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 7, 8, 9, and 52

Government procurement.

Dated: December 19, 2013.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 7, 8, 9, and 52 as set forth below:

1. The authority citation for 48 CFR parts 7, 8, 9, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 7—ACQUISITION PLANNING

2. Amend section 7.102 by revising paragraph (a) to read as follows:

7.102 Policy.

(a) Agencies shall perform acquisition planning and conduct market research (see part 10) for all acquisitions in order to promote and provide for—

(1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251, et seq.);

(2) Full and open competition (see part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1));

(3) Selection of appropriate contract type in accordance with part 16; and

(4) Appropriate consideration of the use of pre-existing contracts, including interagency and intra-agency contracts, to fulfill the requirement, before awarding new contracts. (See 8.002 through 8.004 and subpart 17.5).

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

3. Revise section 8.000 to read as follows:

8.000 Scope of part.

This part deals with prioritizing sources of supplies and services for use by the Government.

4. Revise section 8.002 to read as follows:

8.002 Priorities for use of mandatory Government sources.

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the mandatory Government sources and publications listed below in descending order of priority:

(1) Supplies. (i) Inventories of the requiring agency.

(ii) Excess from other agencies (see subpart 8.1).

(iii) Federal Prison Industries, Inc. (see subpart 8.6).

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7).

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency (see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points.

(2) Services. Services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see subpart 8.7).

(b) Sources other than those listed in paragraph (a) of this section may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101-25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use.

5. Revise section 8.003 to read as follows:

8.003 Use of other mandatory sources.

Agencies shall satisfy requirements for the following supplies or services from or through specified sources, as applicable:

(a) Public utility services (see part 41).

(b) Printing and related supplies (see subpart 8.8).

(c) Leased motor vehicles (see subpart 8.11).

(d) Strategic and critical materials (e.g., metals and ores) from inventories exceeding Defense National Stockpile requirements (detailed information is available from the DLA Strategic Materials, 8725 John J. Kingman Rd., Suite 3229, Fort Belvoir, VA 22060-6223).

(e) Helium (see subpart 8.5—Acquisition of Helium).

6. Redesignate section 8.004 as section 8.005; and add a new section 8.004 to read as follows:

8.004 Use of other sources.

If an agency is unable to satisfy requirements for supplies and services from the mandatory sources listed in 8.002 and 8.003, agencies are encouraged to consider satisfying requirements from or through the non-mandatory sources listed in paragraph (a) of this section (not listed in any order of priority) before considering the non-mandatory source listed in paragraph (b) of this section. When satisfying requirements from non-mandatory sources, see 7.105(b) and part 19 regarding consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including 8(a) participants), and women-owned small business concerns.

(a)(1) Supplies. Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, and any other procurement instruments intended for use by multiple agencies, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts (e.g., Federal Strategic Sourcing Initiative (FSSI) agreements accessible at <http://www.gsa.gov/fssi> (see also 5.601)).

(2) Services. Agencies are encouraged to consider Federal Prison Industries, Inc., as well as the sources listed in paragraph (a)(1) of this section (see subpart 8.6).

(b) Commercial sources (including educational and non-profit institutions) in the open market.

8.402 [Amended]

7. Amend section 8.402 by removing from paragraph (a) "(see 8.002)" and adding "(see 8.004)" in its place.

PART 9—CONTRACTOR QUALIFICATIONS

9.405-1 [Amended]

8. Amend section 9.405-1 by removing from paragraph (b)(2) "optional use".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.208-9 [Amended]

9. Amend section 52.208-9 by removing from the introductory paragraph "8.004" and adding "8.005" in its place.

[BILLING CODE 6820-EP]

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